

**BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In Re: K&M Douglas Trust

**Petition for Waiver or Variance from Provision
of Rule 62B-33.0051(1)(a)3., F.A.C.**

**OGC File No.: 21-1190
ORCP No.: PB-1390 AR V**

FINAL ORDER GRANTING PETITION FOR VARIANCE

On November 22, 2021, K&M Douglas Trust (“Petitioner”), filed a petition with the Florida Department of Environmental Protection (“Department”) requesting a variance or waiver¹ under Section 120.542, Florida Statutes (“F.S.”), for a permanent waiver or variance from a portion of Rule 62B-33.0051(1)(a)3., Florida Administrative Code, (“F.A.C.”), which requires a property to be unarmored to be authorized for construction of armoring.

The Department published notice of receipt of the petition in the Florida Administrative Register on November 23, 2021. No public comment was received.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

1. Petitioner owns property seaward of the Coastal Construction Control Line located at 870 S. Ocean Boulevard, Palm Beach, Florida 33480 (“Property”). On August 16, 2021, Petitioner applied for a permit to reconstruct an existing seawall.
2. The Department is the state agency charged with the regulation of construction of rigid coastal armoring structures under Section 161.085, F.S., and the rules promulgated thereunder.
3. Rule 62B-33.0051, F.A.C., governs the design and construction criteria of rigid coastal armoring. For coastal armoring to be authorized, it must fall within one of the listed criteria in Rule 62B-33.0051.
4. Rule 62B-33.0051(1)(a)3., authorizes the construction of coastal armoring when:

A gap exists, that does not exceed 250 feet, between a line of rigid coastal armoring that is continuous on both sides of the unarmored property. Such adjacent armoring shall not be deteriorated, dilapidated, or damaged to such a degree that it no longer provides adequate protection to the upland property. The top of the adjacent armoring must be at or above the still water level, including setup, for the design storm of a 15-year return interval storm plus the breaking wave calculated at its highest achievable level based on the maximum eroded beach profile and highest surge level combination. The adjacent armoring must be stable under the design storm of 15-year return interval storm, including maximum

¹ A *variance* “means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule.” Section 120.52(21), F.S. A *waiver* means “a decision by an agency not to apply all or part of a rule to a person who is subject to the rule.” Section 120.52(22), F.S. In this case, the relief sought can be construed as a waiver. As explained below, Petitioners seek that a portion of Rule 62B-33.0051, F.A.C. not be applied (i.e., a waiver).

localized scour with adequate penetration, and must have sufficient continuity or return walls to prevent upland erosion and flooding under the design storm of 15-year return interval storm. Such installation shall:

- a. Be sited no farther seaward than the adjacent armoring,
- b. Close the gap between the adjacent armoring,
- c. Avoid significant adverse impacts to marine turtles,
- d. Not exceed the highest level of protection provided by the adjoining walls; and,
- e. Comply with the requirements of Section 161.053, F.S.

5. Petitioner seeks a permanent variance or waiver from the requirement that the Property be unarmored for armoring to be authorized under Rule 62B-33.0051(1)(a)3.

6. Petitioner's seawall was constructed in the late 1920s by the Town of Palm Beach as part of an extensive and continuous line of armoring along the shoreline.

7. Petitioner alleges that removal of the portion of the seawall on the Property, without any lateral support to the adjoining wall to the north, would create a risk of failure of the neighboring segment of the seawall. Further, the sandy beach seaward of the existing wall in this area is narrow. Removal of the seawall on the Property would create a heightened risk of erosion and flooding to Petitioner's Property as well as the properties to the north and south.

THE WAIVER WILL MEET THE UNDERLYING PURPOSE OF THE STATUTE

8. Section 120.542(2), F.S., states "variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when the application of a rule would create a substantial hardship or would violate principles of fairness." The variance and waiver procedure is intended to provide relief from unreasonable, unfair, and unintended results in unique cases.

9. Rule 62B-33.0051, F.A.C., implements in part Section 161.085, F.S., which sets forth the state's policy on rigid coastal armoring structures. This section recognizes the need to protect private structures and public infrastructure from damage or destruction caused by coastal erosion. The statute provides that armoring may be permitted provided that the private structures or public infrastructure is vulnerable to damage from frequent coastal storms, and that the siting and design of the armoring takes into consideration protection of the beach-dune system, impacts on adjacent property, preservation of public beach access, and protection of native coastal vegetation and nesting marine turtles and their hatchlings. The intent of the statute is to strike the appropriate balance between the protection of the coastal system and the need to protect private structures and public infrastructure.

10. The Petitioner demonstrated that the purpose of the underlying statute will be achieved because the existing armoring has been in place for almost a century without adverse impacts to the beach and dune system. Further, requiring the removal of the seawall prior to construction of the armoring would create unnecessary impacts to the beach and dune system.

**SUBSTANTIAL HARDSHIP AND VIOLATIONS OF
PRINCIPLES OF FAIRNESS**

11. “Substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the entity requesting the variance or waiver. “Principles of fairness” are violated when the literal application of a rule affects a particular entity in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. Section 120.54(2), F.S.

12. Literal or strict application of Rule 62B-33.0051(1)(a)3., F.A.C., would require Petitioner to remove the existing wall prior to constructing the new armoring. However, removal of the existing armoring would cause unnecessary impacts to the beach and dune system, has the potential to cause the failure of the next segment of the wall and increases the risk of erosion and flooding to the neighboring properties.

13. The facts set forth in the Petition and supporting documentation, which are summarized above, establish that strict application of Rule 62-33.0051(1)(a)3., F.A.C., would result in substantial hardship and that literal application of the rule would affect Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rules.

CONCLUSION

Based on the foregoing reasons, the Petitioner has demonstrated that it has met the requirements for a permanent waiver of the rule.

THEREFORE, IT IS ORDERED:

The Petition for a waiver from Florida Administrative Code Rule 62-33.0051(1)(a)3. is GRANTED, subject to the following conditions:

A. This waiver shall remain in effect for a period of time to run concurrently with the period of time of any Department-issued permit to Petitioners to construct armoring at this site under permit number **PB-1390 AR** or any associated modifications to permit number **PB-1390 AR**.

B. This order in no way relieves Petitioners from any other procedural or substantive rule requirements associated with obtaining a coastal armoring permit, nor does it guarantee that such a permit will be granted. Petitioner is required to satisfy all permit criteria other than the criteria waived herein.

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the request for a variance or waiver.

Petition for Administrative Hearing

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. Pursuant to Rule 28-106.201, F.A.C., a petition for an administrative hearing must contain the following information:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, telephone number, and any e-mail address of the petitioner; the name, address, telephone number, and any e-mail address of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

(g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

The petition must be filed (received by the Clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

Time Period for Filing a Petition

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing must be filed within 21 days of receipt of this written notice. The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

Extension of Time

Under Rule 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable

deadline for filing a petition for an administrative hearing. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

Mediation

Mediation is not available in this proceeding.

Judicial Review

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE AND ORDERED this 7th day of December 2021 in LEON COUNTY, FLORIDA.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Lainie Edwards, Deputy Director
Office of Resilience and Coastal Protection
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on December 7, 2021, to the below listed persons.

FILING AND ACKNOWLEDGMENT FILED, on this date, under 120.52(7) of the Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Lea Crandall December 7, 2021
Clerk Date

Copies furnished to:

Petitioner, K&M Douglas Trust
Joint Administrative Procedures Committee
Lea Crandall, Agency Clerk

THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In Re: Petition for Variance
Or Waiver of Rule 62-33.0051(1)(a)3. F.A.C.

BY

FDEP FILE NO. PB-1390-AR

K&M DOUGLAS TRUST

OGC FILE NO. _____

PETITION FOR PERMANENT VARIANCE FROM OR WAIVER OF RULE
SUBSECTION 62B-33.0051(1)(a)3. F.A.C.

Petitioner K&M Douglas Trust (“Petitioner”) by and through its undersigned counsel pursuant to Section 120.542 Florida Statutes and Rule 28-104, F.A.C. petitions for a permanent variance or waiver from application of language contained in the Florida Department of Environmental Protection’s (“FDEP”) Rule Subection 62B-33.0051(1)(a)3. F.A.C. and states:

1. Petitioner’s mailing address is 126 Hill Drive, Kentfield, California 94904
2. Petitioner’s property (“the Property”) that is the subject location of this Petition is 870 S. Ocean Boulevard, Palm Beach, Florida 33480.
3. Petitioner seeks a permanent variance or waiver from language contained in Rule Subsection 62B-33.0051(1)(a)3. F.A.C. authorizing coastal armoring when “A gap exists, that does not exceed 250 feet, between a line of rigid coastal armoring that is continuous on both sides of the **unarmored** property.” (emphasis supplied). The word “unarmored” is the subject of this Petition for variance or waiver.
4. This rule subsection implements Subsection 161.085(2)(c), Florida Statutes, which states:

Permits for present installations of coastal armoring may be issued where such installation is between and adjoins at both ends rigid coastal armoring structures, follows a continuous and uniform armoring structure construction line with existing coastal armoring structures, and is no more than 250 feet in length.

This statutory provision allowing wall construction between adjoining walls where the distance is no more than 250 feet in length does not state that the site of the present installation shall be “unarmored”. The Petitioner is requesting a variance or waiver from the rule’s use and application of the word “unarmored” as contained below.

BACKGROUND

5. Petitioner's Property is located on the Atlantic Ocean beach seaward of the coastal construction control line adopted by FDEP as its line of regulatory jurisdiction in Palm Beach County pursuant to s. 161.053, Florida Statutes. The shoreline length of the Property does not exceed 250 feet. The Property is a beachfront parcel east of and adjacent to South Ocean Boulevard in the Town of Palm Beach (the "Town") that is part of and included in an extensive and continuous line of shoreline seawalls installed by the Town to protect beachfront property in the late 1920's and early 1930's. These beachfront parcels, including the Property, extending through the Town north and south of the Petitioner's Property, still have these continuous and connected seawalls that have been on these properties for nearly a century, whether originally constructed or reconstructed.
6. Numerous properties containing these continuous and connected seawalls in the Town have been reconstructed over the years to allow the walls to be built to current or then current coastal armoring standards and the Town's wall elevation minimum height code requirements to address coastal flooding and resiliency. Rule 62B-33.0051 was adopted in 1996 and has been amended several times through 2008. The FDEP has in the past approved reconstruction permits for a number of these walls on other nearby properties. The property adjoining the Property to the south has a reconstructed seawall approved by FDEP pursuant to the rule subsection that is the subject of this Petition for Variance or Waiver. That permitted and reconstructed wall complies with current state and local coastal armoring standards, including the Town's present wall height requirements as described in Paragraph 9 below, and the Petitioner wishes to reconstruct its seawall to comply with current coastal armoring construction standards and to be consistent with the adjoining seawall to the south of the Property.
7. Since 62B-33.0051 F.A.C. was adopted and later last amended in 2008, federal, state and local governments have become increasingly aware of and focused on the effects of sea level rise and the resulting flooding, erosion and storm effects of this increasing phenomenon. Federal, state, and local regulatory and funding initiatives have been adopted to require consideration of the effects of sea level rise on governmental approvals,

regulatory requirements, flood insurance and grant funding programs to provide protection and resiliency to private and public property.

8. In 2021, the State of Florida adopted and funded legislation to establish governmental criteria and funding programs to study and provide for flooding and coastal resiliency measures in light of sea level rise and increasing coastal flooding.
9. The Town has also addressed resiliency issues by adopting Town Code provisions that require a higher minimum elevation height for bulkheads and seawalls constructed along the Town's shorelines to provide greater resiliency for property and public infrastructure. The present Town minimum height elevation for construction approval for a seawall or bulkhead wall exceeds the height of the Petitioner's existing older wall at its Property.
10. The Property is narrow from east to west, fronts the Atlantic Ocean, and it is bounded on the west by Ocean Boulevard, which is part of a public evacuation route. There are no structures on the Property.

PENDING CCCL APPLICATION AND RULE REQUIREMENTS

11. The Petitioner has a coastal construction control line ("CCCL") permit application, Application No. PB-1390-AR, pending before FDEP for the reconstruction of Petitioner's existing and connected seawall constructed nearly a century ago. Pursuant to s.120.60 F.S., the application, PB-1390-AR, is complete and is due for final agency action on or before December 21, 2021. The application was filed pursuant to sections 161.053 and 161.085, F.S and Chapter 62B-33 F.A.C.
12. The FDEP rule authorizing permits for coastal armoring (including bulkheads and seawalls) provides in pertinent part as follows:

62B-33.0051 Coastal Armoring and Related Structures.

(1) General Armoring Criteria. In determining the appropriate means to protect existing private structures and public infrastructure from damage from frequent coastal storms, applicants should be aware that armoring may not be the only option for providing protection. Applicants are encouraged to evaluate other protection methods such as foundation modification, structure relocation, and dune restoration. If armoring (other than through the use of geotextile containers as the core of a reconstructed dune, which are governed exclusively by Chapter 62B-56, F.A.C.), is the selected option, the following siting, design, and construction criteria shall apply in order to minimize potential adverse impacts to the beach and dune system:

(a) Construction of armoring shall be authorized under the following conditions:

1. The proposed armoring is for the protection of an eligible structure; and,

2. The structure to be protected is vulnerable. The determination of vulnerability will be made utilizing the dune erosion model contained in the report entitled "Erosion due to High Frequency Storm Events," by the University of Florida, dated November 22, 1995, which is incorporated herein by reference. Where direct application of the model shows that the structure to be protected is not vulnerable, but the construction otherwise meets the requirements of this rule chapter, an applicant may further demonstrate vulnerability by taking into account the effects of shoreline change rates, natural physical features, and existing manmade structures in accordance with the following circumstances:

a. If it is projected that the eligible structure will become vulnerable at some future date which falls within the authorized time limit of a permit, then the permit shall authorize the construction of armoring once the anticipated site condition changes occur and the structure becomes vulnerable. The permit shall allow additional time to allow for construction operations and appropriate timing to avoid construction during the marine turtle nesting season.

b. Where there are multiple eligible structures in close proximity to one another, but not all of the structures are vulnerable and shoreline trends indicate continued erosion stress on the shoreline, and the Department determines through the use of numerical modeling and engineering analysis that the construction of armoring for only the vulnerable structures would cause the adjacent structures to become vulnerable following installation of the armoring, then all the eligible structures are considered vulnerable...

...d. Where an applicant demonstrates to the Department that another site specific circumstance exists other than listed in sub-subparagraphs 62B-33.0051(1)(a)2.a. through c., F.A.C., such that the eligible structure is vulnerable, or

3. **A gap exists, that does not exceed 250 feet, between a line of rigid coastal armoring that is continuous on both sides of the unarmored property. Such adjacent armoring shall not be deteriorated, dilapidated, or damaged to such a degree that**

it no longer provides adequate protection to the upland property. The top of the adjacent armoring must be at or above the still water level, including setup, for the design storm of a 15-year return interval storm plus the breaking wave calculated at its highest achievable level based on the maximum eroded beach profile and highest surge level combination. The adjacent armoring must be stable under the design storm of 15-year return interval storm, including maximum localized scour with adequate penetration, and must have sufficient continuity or return walls to prevent upland erosion and flooding under the design storm of 15-year return interval storm. Such installation shall:

- a. Be sited no farther seaward than the adjacent armoring,
 - b. Close the gap between the adjacent armoring,
 - c. Avoid significant adverse impacts to marine turtles,
 - d. Not exceed the highest level of protection provided by the adjoining walls; and,
 - e. Comply with the requirements of Section 161.053, F.S.
4. The armoring shall not result in a loss of public access along the beach without providing alternative public access,
 5. The construction will not result in a significant adverse impact....
 - (d) Major reconstruction of existing armoring is exempt from the requirements of subparagraph 62B-33.0051(1)(a)2., F.A.C., unless the habitable structure protected by the armoring has been destroyed to the extent that it requires rebuilding.... (emphasis provided above)

13. It is important to note that Rule 62B-33.0051 F.A.C. was last revised in 2008, well before current state, local and federal sea level rise and shoreline property flood resiliency laws, rules and polices were adopted.

14. As stated in Paragraph 7 above, there are no structures on the Property; consequently, the rule provisions allowing coastal armoring to protect “vulnerable” or “eligible” structures do not relate to the Property’s conditions.

15. Pursuant to the definition of “major reconstruction” in the Definitions rule 62B-33.002(27) F.A.C., major reconstruction of a seawall is only allowed to the wall’s “original level of protection”. Therefore, the provisions of 62B-33.0051(1)(d) above would not allow for major reconstruction of the existing wall to meet current coastal armoring criteria, including the Town’s code requiring higher seawall elevations than historically allowed to address current sea level rise flooding and resiliency concerns.

16. However, rule subsection 62B-33.0051(1)(a)3.d. does allow for a wall connecting to adjoining walls for a distance less than 250 feet to meet the highest level of protection provided by the adjoining walls. For the Property, the adjoining wall to the south was reconstructed since 2019 and meets current coastal armoring criteria including meeting the Town's code for wall elevation minimum height. The Petitioner's and the Department's professional engineers have agreed that any replacement wall on the Property should only be constructed to one elevation and should match the elevation of the newer and adjoining wall to the south of the Property.
17. Therefore, rule subsection 62B-33.0051(1)(a)3. would be the appropriate rule provision to allow wall reconstruction at the Property that would meet current state and local criteria and would also be entirely consistent with the statutory provisions of s. 161.085(2)(c) F.S., except for the rule language that adds the word "*unarmored*" to the property where the wall is to be constructed pursuant to 62B-33.0051(1)(a)3. F.A.C.
18. The rule wording of "unarmored" property is not included in the implemented statutory language found in s.161.085(2)(c) Florida Statutes.
19. As the Petitioner's Property has been armored for many decades with an older seawall that the Petitioner desires to update to current coastal armoring standards and criteria, the Property would not qualify for authorization to reconstruct the wall to current standards consistent with the adjoining seawall to the south pursuant to rule subsection 62B-33.0051(1)(a)3 F.A.C. due to rule language that there be continuous seawalls on both sides of the *unarmored* property. Again, the word "unarmored" is not present in the implemented statutory section 161.085(2)(c) Florida Statutes.
20. FDEP believes at this time that the word "unarmored" in its rule language will not allow it to issue a permit to Petitioner for reconstruction of a seawall at the Property unless this Request for Variance or Waiver is granted. Therefore, Petitioner is now seeking a variance and/or waiver to the "unarmored" property language of 62B-33.0051(1)(a)3. F.A.C.

VARIANCE AND WAIVER PROVISIONS

21. Section 120.542 Florida Statutes allows for a variance or waiver from FDEP rules as follows:

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the appropriate agency of the Federal Government. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

22. Section 120.52 defines "variance" and "waiver" as follows:

(21) "Variance" means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Any variance shall conform to the standards for variances outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

- (22) “Waiver” means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Any waiver shall conform to the standards for waivers outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

PETITIONER IS ENTITLED TO A VARIANCE OR WAIVER FROM THE
CITED RULE PROVISION

23. As stated below, Petitioner submits that strict application of the referenced rule provision would lead to unreasonable, unfair and unintended results; would create substantial hardships, and would violate principles of fairness. Petitioner submits that the plain language and intent of Section 161.085 Florida Statutes will be achieved if this petition for variance or waiver of the rule language is granted.

STRICT APPLICATION OF THE RULE WILL LEAD TO UNREASONABLE, UNFAIR
AND UNINTENDED RESULTS

24. The language found only in subsection 16B-33.0051(1)(a)3. requiring that the 250-foot shoreline between the continuous and adjoining coastal armoring be “unarmored” prior to receiving a permit to reconstruct an older seawall would not allow the Petitioner to have the benefit of continued maintenance and protection of the Property from floods and erosion losses both for its Property and for the adjoining and nearby properties, including South Ocean Boulevard, a critical public evacuation route, if the existing wall were to be removed prior to applying for permits and the property remained unprotected for the months needed for permit processing and issuance, and scheduling and completion of wall reconstruction.

The beach between the Property’s seawall and South Ocean Boulevard is quite narrow, and removal of the wall for any significant length of time prior to filing an application for wall reconstruction, receiving a permit, assembling construction materials and contractors and commencing wall reconstruction presents an unreasonable risk of loss of the Property, engineeringly expected risk of failure of the adjoining older wall on property to the north, and further risk of adverse impacts of erosion and loss to those properties which are part of the beach/dune system that Chapter 161, Florida Statutes and Chapter 62B-33 F.A.C. are designed to protect. Additionally, Petitioner asserts that the

absence of a seawall at the Property for any significant length of time presents flooding and safety risks to South Ocean Boulevard. This is an unintended result of application of the rule provision.

The rule requirement that the long-armored property must first become “unarmored” to otherwise meet rule language to reconstruct the seawall to current construction and code requirements and match the newer seawall on the adjoining property to the south results in unreasonable and unfair results and risks for the Petitioner.

Rule language that prevents a property owner meeting the statutory criteria in s. 161.085(2)(c) F.S. from being able to reconstruct its existing coastal armoring to current governmental and adjacent wall standards without risk of loss and damage to its property and to property of others is unreasonable and leads to a result not intended by s. 161.085 or elsewhere in Chapter 161, Florida Statutes.

Rule 62B-33.0051 is written such that absent a showing that the property has an “eligible” or “vulnerable” structure to protect, wall reconstruction meeting 21st Century governmental criteria and adjoining wall features would not be permitted unless the Property is “unarmored”, which is an unintended and unreasonable result for Petitioner. The Petitioner’s Property has been armored for almost a century, is narrow and in a vulnerable location on the Atlantic Ocean, and it otherwise meets the statutory criteria listed in s. 161.085(2)(c) Florida Statutes. The effect of the rule on the Petitioner is clearly an unintended result.

STRICT APPLICATION OF THE RULE WOULD CREATE SUBSTANTIAL HARDSHIPS

25. As described in the preceding Paragraphs 24, above, strict compliance with the rule to require the Property that lacks structures to first become “unarmored” as the only regulatory permissible path to reconstructing its long-term seawall to current governmental and adjoining wall standards would create a substantial hardship for the Petitioner. The Petitioner would bear the burden of a real and present risk of loss of property due to erosion, storm effects, and tidal flooding should the present wall be removed for sufficient time to process, permit and implement reconstruction of its seawall. Furthermore, if the wall is removed to render the Property unarmored prior to reconstruction, the Petitioner’s certified

professional engineers at Isiminger & Stubbs Engineering, Inc. have stated that the adjoining older wall to the north that lacks any lateral support would be expected to fail. This would create risks of property losses and expenses for the adjacent property owner, thereby creating additional undue and unpredictable economic risks, losses and burdens for the Petitioner. Strict compliance with the rule language creates substantial and predicable economic and technical hardships for the Petitioner.

APPLICATION OF THE RULE WOULD VIOLATE PRINCIPLES OF FAIRNESS

26. Section 120.542(2) Florida Statutes states that “principles of fairness” “are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.”
27. In this case, the Petitioner has been advised that even though a property owner of a parcel less than 250 feet in length with continuous and adjoining seawalls may *construct a new* wall to meet those adjoining seawalls, pursuant to 62B-33.0051()(a)3, if in the future, its property has not been developed, unlike other property owners in other circumstances wishing to reconstruct their coastal armoring, the rule will not allow this property owner to *reconstruct* and modernize its seawall to meet adjoining wall criteria without first undertaking the expense and risks of removing its seawall prior to permit review and issuance.
28. Rule 62B-33.0051 allows reconstruction of a wall to protect a vulnerable or eligible structure and also allows major reconstruction of a seawall if the reconstruction does not exceed the “protective value” *of the existing wall*. However, the Petitioner’s wall was not built to FDEP or recent governmental standards, and it would be fundamentally unfair to require the Petitioner to reconstruct its wall to the level of construction used nearly a century ago, particularly in light of the updated height and construction of the reconstructed adjoining wall to the south.
29. As described above in Paragraphs 7 through 9 of this Petition, coastal conditions have substantially altered since Petitioner’s wall was built. The beaches in the vicinity have eroded, sea level rise has and continues to occur, and “sunny day flooding” of dry land and roadways due to rising sea levels and tidal conditions are not uncommon along the southern Florida Atlantic coastline.

30. The strict application of the language in subsection 62B-33.0051(1)(a)3. F.A.C. that includes the word “unarmored” now prevents FDEP from issuing a permit to Petitioner to reconstruct its seawall to state construction standards that have been in place for at least the past 25 years where the undeveloped Property meets the remaining rule language in that subsection. The application of this rule language affects the Petitioner in a manner substantially differently from other property owners who either lack any wall or who have a wall that was rebuilt to criteria and levels promulgated since Petitioner’s wall was originally constructed.
31. Rule subsection 62B-33.0051(1)(a)3 F.A.C. that is the subject of this Petition has been colloquially referred to by CCCL staff and consulting engineers as the “gap closure” provision, even though s.161.085(2)(c) Florida Statutes, the implemented law, does not contain the term “gap”.
32. In recent years, FDEP has issued permits pursuant to 62B-33.0051(1)(a)3. to *reconstruct* the older continuous seawalls on adjacent and nearby properties. These permits were issued by prior FDEP professional engineer managers who have since retired, and new staff members are now in those CCCL management roles.
33. The adjoining property to the south was able to obtain FDEP Permit No. PB-1314-AR in 2019 to reconstruct its original seawall to current state and local standards under the authority of the subject subsection 62B-33.0051(1)(a)3. That property’s original wall was built at the same time as and connected to the Petitioner’s wall.
34. **Exhibit “A”** attached hereto, is an aerial closeup photograph depicting the Petitioner’s Property, 870 S. Ocean Blvd. with the proposed reconstructed wall shown in dotted red line, and the adjacent and nearby seawalls in the immediate vicinity that have received FDEP permits in the past eleven years to reconstruct the older continuous seawalls on those properties. FDEP Permits Nos. PB-1314-AR, PB-1313-AR and PB-1306-AR, labelled as “Gap Closure” were issued in 2019 to reconstruct the older seawalls existing on those properties to meet current Town code and FDEP requirements pursuant to 62B-33.0051(1)(a)3. F.A.C.
35. Petitioner also desires to reconstruct its seawall to connect to and meet the same requirements as the adjacent reconstructed seawall to the south and other walls in the immediate vicinity reconstructed under the same circumstances, and it would violate

principles of fairness to deny this variance and disallow the Petitioner a permit to reconstruct its wall to current criteria under Chapter 62B-33 based on the single word “unarmored” that was included in the referenced rule subsection.

THE VARIANCE OR WAIVER WILL SERVE THE PURPOSES OF THE
UNDERLYING STATUTE

36. Section 161.085(1) Florida Statutes recognizes the need to protect “private structures”, “public infrastructure”, and “private property” from damage or destruction caused by coastal erosion. Section 161.085, “Rigid Coastal Armoring Structures,” provides the state’s statutory policies and intentions in allowing for the construction of coastal armoring structures in specified circumstances. Subsection (2) of the statute authorizes FDEP to issue permits pursuant to sections 161.041 and 161.053 Florida Statutes “to protect private structures, public infrastructure, and private and public property.” The Petitioner’s pending application is for the issuance of a permit pursuant to s. 161.053 and s. 161.085(2)(c) Florida Statutes for the reconstruction of its seawall.
37. Subsection 161.085(2)(c) Florida Statutes is the implementing law for 62B-33.0051(1)(a)3. However, subsection 161.085(2)(c) does not include the same wording contained in the applicable rule subsection:
- (c) Permits for present installations of coastal armoring may be issued where such installation is between and adjoins at both ends rigid coastal armoring structures, follows a continuous and uniform armoring structure construction line with existing coastal armoring structures, and is no more than 250 feet in length.

The statutory language does not include the word “unarmored” that was included in the applicable rule provision authorizing issuance of a permit for a property otherwise meeting the requirements of the statutory subsection.

38. It is an unreasonable and unintended result to assume that the legislature created subsection 161.085(2)(c) to allow construction of a wall on certain properties that may lack upland structures and meet the requirements of that subsection, but then did not intend to allow those property owners to ever reconstruct the older walls in a reasonable manner to meet

updated and local government resiliency requirements without substantially changing the status and character of the property or risking loss and economic harm.

THE REQUESTED VARIANCE OR WAIVER IS PERMANENT

39. Based upon the extended connectivity and continuity of the seawalls along the shoreline of the Town for nearly one hundred years, with the need to continue to provide stability and protection to the properties and public infrastructure presently protected by the continuous walls that have been constructed and reconstructed since the early part of the twentieth century, it is critical to maintain that continuous line of walls across the Petitioner's Property. FDEP has determined that permitted reconstruction of the existing wall to meet the standards of the reconstructed adjoining wall to the south would require a permanent variance from the identified rule language for the Petitioner to reconstruct and maintain the wall pursuant to the provisions of sections 120.542 and 161.085, Florida Statutes.

CONCLUSION

The granting of a variance and/or waiver to the requested language containing the word "unarmored" in rule subsection 62B-33.0051(1)(a)3. to allow Petitioner to receive a permit pursuant to that subsection and authority of s. 161.085(2)(c) Florida Statutes for the reconstruction of its seawall on property lacking structures in order to meet current state and local approval standards and the engineering and resiliency standards applied to the adjacent and reconstructed adjoining wall south of the Property will achieve the purposes of the relevant statutes while relieving Petitioner of the burdens of undue and substantial hardship, unreasonableness, risks of economic loss, loss of property, and lack of principles of fairness.

ACCORDINGLY, the Petitioner respectfully requests that the Florida Department of Environmental Protection issue a final order granting the permanent variance and/or waiver to the specified language contained in rule section 62B-33.0051(1)(a)3. F.A.C. as requested in this Petition.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via email with Lea Crandall, Agency Clerk, Florida Department of Environmental Protection, 3900 Commonwealth Boulevard, M.S. #35, Tallahassee, Florida 32399, lea.crandall@dep.state.fl.us with a copy to the Joint Administrative Procedures Committee, Room 120, The Holland Building and Tallahassee, Florida 32399-1300, 680 Pepper Building, 111 W. Madison Street, Tallahassee, FL 32399-1400 and via email at japc@leg.state.fl.us . A copy was sent via email to Matthew Knoll, Esquire, Office of the General Counsel at matthew.knoll@dep.state.fl.us, to Douglas Aarons, Program Administrator of the Coastal Construction Control Line Program, Douglas.Aarons@FloridaDEP.gov and to Lainie Edwards, Deputy Director of the Office of Resilience and Coastal Protection, Lainie.edwards@dep.state.fl.us

/s/ Deborah A. Getzoff
Attorney

